88-438 (1)

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

—o—

LANCE R. DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

BLACKMON & DROZD
CLYDE M. BLACKMON
DALE A. DROZD
660 J Street, Suite 260
Sacramento, CA 95814
Telephone: (916) 441-0824

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1) Is the issue of whether a false statement or omission of material fact in a search warrant affidavit is intentional or demonstrates a reckless disregard for the truth of the affidavit, a question of law which is subject to non-deferential *de novo* review on appeal?

2) Under any standard of review, did the Court of Appeals err in upholding the district court's ruling that a statement, known to be false by the affiant at the time he made it, can nonetheless constitute mere negligence as opposed to an intentional falsehood or a statement demonstrating a reckless disregard for the truth?

3) Is a redacted affidavit which relies almost solely upon the accusations of an in-custody informant who is apprehended in the commission of a crime and then implicates others in that crime, sufficient to establish probable cause to search the residence of the persons so implicated?

LIST OF PARTIES/RELATED ENTITIES

All parties to the proceedings in the Court of Appeals are listed in the caption of this Petition.

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LANCE R. DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Lance R. Dozier respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 19, 1988, amended on July 6, 1988 and is published at 844 F.2d 701. A copy is attached as an appendix to this petition. The Ninth Circuit had originally issued an opinion in this case on September 1, 1987. However, that Opinion was withdrawn on April 19, 1988.

JURISDICTION

This Court has jurisdiction to entertain this petition under 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ."

STATEMENT OF THE CASE

I. Summary of Material Facts

This case stems from a search of petitioner's residence pursuant to a warrant issued by a federal magistrate. It is the various troubling aspects of the affidavit in support of this warrant that make the case appropriate for review by this Court.

The search warrant affidavit related to a marijuana cultivation investigation which local law enforcement authorities had concluded five and one-half months earlier. That local investigation terminated without a search warrant being issued. The record reflects that on at least two occasions the local district attorney's office had refused to seek a search warrant for petitioner's residence based upon this same information due to a lack of probable cause.

After the termination of the local investigation the affiant Drug Enforcement Administration Agent (Agent Offield) reviewed the local law enforcement file. He spoke briefly to the officer who had conducted that investigation. The affiant conducted essentially no further investigation. He prepared his affidavit just five days after receiving the local investigation file and relied almost solely upon the information which it contained. As both the district court and the Court of Appeals observed "99 44/100%" of the information in the affidavit consisted of the statements of the in-custody informant who had been caught red-handed by the authorities working at the marijuana cultivation site. 844 F.2d at 706. Most importantly, the affidavit contained five false statements

and omitted six facts, nearly all of which were conceded by the government and all of which were material to the probable cause determination.

In this regard, the affidavit falsely stated that a car registered to the in-custody informant was seen by police at petitioner's residence on the day of the informant's arrest in the marijuana garden. This statement was blatantly false and was the only information in the affidavit directly associating the informant to petitioner or to the petitioner's residence. As the Court of Appeals noted "[Affiant] Offield had done a Department of Motor Vehicles check and knew that no cars on Dozier's property at the time of [informant] Mejia's arrest were registered to Mejia." 844 F.2d at 706. Thus, the affiant knew that the statement was false when he made it in his affidavit.

In addition, Agent Offield also falsely stated in his affidavit that petitioner had "a record detailing convictions for drug violations" when in fact petitioner had a single conviction for use of a forged prescription which had occurred 15 years earlier, when he was 19 years old, and which had been set aside and dismissed pursuant to California law. 844 F.2d at 705. The falsity of this allegation within the affidavit was undisputed. Moreover, it was conceded that the affiant had reviewed petitioner's criminal history printout, which accurately set forth petitioner's record, at the time he falsely reported the record in his affidavit.

The affiant also failed to inform the reviewing magistrate that local officers had on two previous occasions taken the same information in the affiant's possession to the local district attorney's office seeking to apply for a

search warrant for petitioner's residence and on both occasions had been turned down because the information failed to establish probable cause to search that location. Finally, the affidavit contained a number of false statements and omitted material facts relating to the manner in which affiant Offield had conducted his investigation, how the information reported was obtained from the in-custody informant and specifically what the informant had said.

Pursuant to the search warrant issued in response to Agent Offield's affidavit, federal law enforcement authorities conducted a search of petitioner's residence on November 21, 1985. During the search federal agents discovered approximately one pound of marijuana, one ounce of cocaine and $20,000. Petitioner and his wife were then arrested.

II. Summary of Procedural History

On November 21, 1985, petitioner and his wife were arrested following a search of their residence that same day. On December 6, 1985, the Federal Grand Jury for the Eastern District of California returned a three count indictment charging petitioner and his wife with conspiracy to manufacture and distribute marijuana, possession of marijuana with the intent to distribute and possession of cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

On February 10, 1986, petitioner filed a motion challenging the legality of the search warrant pursuant to which law enforcement authorities had seized all of the physical evidence in the case. Following a limited eviden-

tiary hearing, the district court denied the suppression motion in its entirety. A written order denying the motion to suppress evidence followed.

On July 22, 1986, petitioner entered a conditional plea of guilty to the charge of violating 21 U.S.C. § 841(a)(1) by possessing marijuana with the intent to distribute. The plea was entered pursuant to Federal Rule of Criminal Procedure 11(a)(2), with appellant specifically reserving his right to appeal from the district court's adverse determination of his motion to suppress evidence.

Petitioner was sentenced to the custody of the Attorney General for a period of five years. The district court also imposed a Special Parole Term of five years and a penalty assessment. Execution of the sentence was stayed pending appeal. A timely notice of appeal was filed on September 5, 1986.

On appeal petitioner argued that the district court erred in ruling that the false statements and omissions of material facts did not demonstrate a knowing or reckless disregard for the truth on the part of the affiant. Petitioner also argued that the district court's determination that the affiant's conduct was neither knowing nor demonstrated a reckless disregard for the truth should be reviewed under the non-deferential *de novo* standard of appellate review. Moreover, it was argued that the district court erred as a matter of law in ruling that the redacted affidavit was sufficient to establish probable cause because it was based almost solely upon the uncorroborated assertions of an in-custody informant who had been caught red-handed in the commission of a crime for which he then

sought to inculpate others. Such statements, it was argued, are inherently suspect particularly given the fact they were five and one-half months stale at the time of the search. Finally, petitioner argued that the district court erred in failing to suppress evidence seized under the admittedly overbroad portions of the search warrant.

The Ninth Circuit Court of Appeals originally affirmed petitioner's conviction on September 1, 1987. On April 19, 1988, the Ninth Circuit withdrew its original opinion and in its new opinion affirmed the judgment of the district court in part, reversed in part and remanded for further proceedings, holding that the evidence seized under the admittedly overbroad portions of the warrant should have been suppressed. In affirming the judgment in remaining part, the Court of Appeals noted that while it was "hard to reconcile" the affiant's "actual knowledge with his false statement", the district court's determination that his conduct did not reflect a knowing or reckless disregard for the truth was not "clearly erroneous". 844 F.2d at 706.

Petitioner sought rehearing and suggested the appropriateness of rehearing *en banc*, arguing in particular that the issue of whether established historical facts demonstrate a knowing or reckless disregard for the truth is a legal issue which should be subject to independent review on appeal and that deference to the district court's finding by application of the "clearly erroneous" standard of review was inappropriate. The petition for rehearing and suggestion for rehearing *en banc* were denied without opinion on July 8, 1988.

On July 22, 1988 the Ninth Circuit Court of Appeals granted a stay of its mandate pending the filing, consideration and disposition of this petition.

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REASONS FOR GRANTING REVIEW

I.

THE QUESTION OF WHETHER FALSE STATEMENTS IN OR OMISSIONS OF MATERIAL FACTS FROM A SEARCH WARRANT AFFIDAVIT DEMONSTRATES A KNOWING OR RECKLESS DISREGARD FOR THE TRUTH IS A QUESTION OF LAW, PROPERLY SUBJECT TO DE NOVO REVIEW ON APPEAL AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S JUDGMENT BY APPLICATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW.

As noted above, the Court of Appeals ruled that whether false statements in or omissions from a search warrant affidavit are knowing or demonstrate a reckless disregard for the truth, is a factual finding to be reviewed under the clearly erroneous standard. 844 F.2d at 705-706. While this may be the law of the Ninth Circuit,[1] it is a question

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[1] In its Opinion the Court of Appeals cited *United States v. McQuisten*, 795 F.2d 858 (9th Cir. 1986) and *United States v. Ritter*, 752 F.2d 435 (9th Cir. 1985) for this proposition. In *McQuisten* the Court did not address the issue but merely stated that factual findings of the district court are reviewed under the clearly erroneous standard, while "materiality" is a mixed question of law and fact subject to *de novo* review. 795 F.2d at 863. In *Ritter* the court asserted, without citation to authority, that a conclusion regarding reckless or deliberate falsity was a finding of fact subject to review under the clearly erroneous standard. 752 F.2d at 439.

which is the subject of dialogue in the Circuit Courts. Moreover, the Ninth Circuit's ruling regarding the standard of review is, we believe, in conflict with this Court's decisions regarding similar issues.

In *United States v. A Residence Located at 218 3rd Street*, 805 F.2d 256 (7th Cir. 1986), it was suggested that the application of the "clearly erroneous" standard of review to this issue is subject to question in light of recent decisions by this Court. 805 F.2d at 258-259. The Seventh Circuit noted that "reckless disregard for the truth" has been defined in the First Amendment context by *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), and reviewed this Court's decision in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514, 104 S.Ct. 1949, 1967 (1984), which held that "'appellate judges must exercise independent judgment'" in determining whether a trial court record establishes reckless disregard for the truth in a libel case. 805 F.2d at 258-259.

The diaglogue begun by the Seventh Circuit with respect to the appropriate standard of review to be employed to the determination of "reckless disregard for the truth" in the Fourth Amendment context, is based upon the recent decisions of this Court. Thus, in *Maine v. Taylor*, — U.S. —, 106 S.Ct. 2440, 2451 (1986), the Court observed that the Federal Rules of Criminal Procedure contain no counterpart to Federal Rule of Civil Procedure 52(a) (providing for the clearly erroneous standard or review), while still recognizing the applicability of that standard to pure questions of fact. In *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 451-52 (1985), this Court reviewed the labels

"questions of law", "questions of fact" and "mixed questions of law and fact" in the context of the voluntariness of a confession. Citing *Bose Corp. v. Consumers Union of United States, Inc., supra,* the Court determined that the question of whether a confession was voluntary and thus admissible is a question of law subject to independent review on appeal under the *de novo standard.* 474 U.S. at —, 106 S.Ct. at 452; *See also, Crane v. Kentucky,* — U.S. —, 106 S.Ct. 2142, 2145 (1986) ("The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness . . .").

In its opinion in this case the Ninth Circuit found the false statements in the affidavit hard to reconcile with the affiant's actual knowledge that his statements were false. 844 F.2d at 706. Yet, the Court relied solely upon the clearly erroneous standard of review to uphold the district court's ruling. *Id.* The determination of whether a record demonstrates a knowing or reckless disregard for the truth is an application of a legal standard to a set of historical facts which, in the libel context, has been defined as an issue of law subject to *de novo* review on appeal. *See Bose Corp. v. Consumers Union of the United States, Inc., supra,* 466 U.S. at 514, 104 S.Ct. at 1967; *See also, United States v. A Residence Located at 218 3rd Street,* 805 F.2d at 258-59. At the very least, the issue of whether the record demonstrates a knowing or reckless disregard for the truth is a mixed question of law and fact which should be subject to *de novo* review. *See United States v. McConney,* 728 F.2d 1195 (9th Cir.) (*en banc*), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101 (1984); *See also, Miller v. Fenton, supra,* 474 U.S. at —, 106 S.Ct. at 451-52.

In the present case this important issue is squarely presented. The affiant in this case set forth false information which was critical to the probable cause determination. More importantly, the affiant knew the statements were false when he included them in his affidavit. Nonetheless, the district court concluded that such conduct reflected neither a knowing or reckless disregard for the truth. The Court of Appeals affirmed that determination solely on the basis that it was not "clearly erroneous". 844 F.2d at 706. The application of that standard of review to the issue of what conduct demonstrates a reckless disregard for the truth has been the subject of dialogue in the Circuit Courts and would appear to be inconsistent with this Court's decision in similar settings. Accordingly, we urge the Court to grant this petition and consider this issue.

Moreover, under any standard of review, the affirmance of the district court's judgment was in error. This is best illustrated by the affiant's false statement that a vehicle registered to the informant was seen at the petitioner's residence on the day of the informant's arrest. This false assertion was critical to the probable cause determination because it corroborated the informant and associated petitioner with him. However, as the Ninth Circuit observed:

> "The other significant misstatement is Offield's assertion that Barr had told him he had seen two vehicles on Dozier's property which were registered to Mejia and Giacchero (the suspects arrested near the marijuana garden in June). Barr did not tell Offield the cars were registered to Mejia or Giacchero, and Offield had done a Department of Motor Vehicles

> check and knew that no cars on Dozier's property at the time of Mejia's arrest were registered to Mejia."

844 F.2d at 706.

Thus, the affiant made a knowingly false statement when he said that a car registered to the informant had been seen at the Dozier residence. This establishes not only circumstances evincing obvious reasons to doubt the veracity of his statements, but also a knowing falsehood in the affidavit. Yet, the Ninth Circuit Opinion affirmed the district court's conclusion to the contrary. 844 F.2d at 706.

A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525 (1948). In the present case there was no evidence in the record to support the district court's conclusion that the false statements and omissions of the affidavit demonstrated mere negligence on the affiant's part rather than a knowing or reckless disregard for the truth. This conduct cannot be characterized as mere negligence, for it was a knowing falsehood when it was written. Under any standard of review, the district court's conclusion to the contrary should have been reversed if the language of the appropriate legal standard is to have any meaning.

Finally, in concluding that the district court's determination of mere negligence on the part of the affiant was not clearly erroneous, the Ninth Circuit's opinion is directly in conflict with other Circuit Court opinions. Thus, as one Court has observed:

> "Nor can we accept the proposition that law enforcement officials may freely submit affidavits they know to be false if they deem the falsehood not to be material. While under *Franks* a warrant based upon a false affidavit may be upheld if the falsity was not material, the government in using such an affidavit runs the risk that reviewing courts may subsequently determine "'that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred.' [Citation omitted]"

United States v. Davis, 714 F.2d 896, 900 (9th Cir. 1983); *See also, United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985); *United States v. Chesher*, 678 F.2d 1353, 1362 (9th Cir. 1982); *United States v. Kirk*, 781 F.2d 1498, 1502-1505 (11th Cir. 1986).

Accordingly, this petition should be granted.

II.

THE COURT OF APPEALS' OPINION HOLDING THAT THE REDACTED AFFIDAVIT ESTABLISHED PROBABLE CAUSE DRAMATICALLY CHANGES THE LAW WITH RESPECT TO THE RELIABILITY OF STATEMENTS BY IN-CUSTODY INFORMANTS WHO ARE CAUGHT IN THE COMMISSION OF A CRIME REGARDING WHICH THEY IMPLICATE OTHERS.

As recognized by the Court of Appeals, the reliability of the in-custody informant statements was crucial to the probable cause determination. 844 F.2d at 706. It is undisputed that the informant in this case, an illegal alien, was arrested while tending a marijuana garden. While in custody he implicated petitioner as the person responsible for the marijuana garden. There was virtually no inde-

pendent corroboration of any of the informant's self-serving statements shifting responsibility from himself. It has long been recognized that statements made by an in-custody informant under such circumstances are not statements against penal interest. Nonetheless, in affirming the district court, the Court of Appeals apparently concluded that the informant's statements were against his penal interest and thereby carried with them an indicia of reliability. 844 F.2d at 807. This holding is inconsistent with the weight of the authority.

Many courts have addressed the meaning of "against penal interest" in the context of Federal Rule of Evidence 804(b)(3). Each of the cases hold that a statement made by an in-custody informant under circumstances such as those presented here is not a statement against penal interest. *See United States v. Monaco*, 735 F.2d 1173, 1177 (9th Cir. 1984); *Olson v. Green*, 668 F.2d 421, 427 (8th Cir. 1982); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980).[2]

Moreover, a number of courts have held that accusatory statements made by an in-custody informant implicating others in the commission of the offense, are not statements against penal interest and do not carry with them sufficient indicia of reliability to support a finding of probable cause to issue a warrant. *United States v. Kolodziej*, 712 F.2d 975, 978 (5th Cir. 1983); *United States v. Martin*, 615 F.2d 318, 325-26 (5th Cir. 1980); *United*

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[2] If the statement by the informant in this case does not qualify as "against penal interest" under the Federal Rules of Evidence it is impossible for it to become "against penal interest" in assessing its reliability for probable cause purposes.

States v. Granger, 596 F.Supp. 665, 669 (W.D. Wis. 1984). *See also People v. Campa*, 36 Cal.3d 870, 882, 206 Cal.Rptr. 114, 120 (1984). A similar holding was recently announced in *United States v. Jackson*, 818 F.2d 345 (5th Cir. 1987). In that case the warrant application was based primarily upon the statements of an informant (Dunbar) who admitted committing a burglary and implicated the defendant in the offense. The Court reversed the denial of the defendant's motion attacking the subsequently issued warrant, holding:

> Dunbar's inculpation of Jackson could reasonably be viewed as an attempt to curry favor and receive more lenient treatment from police officials. This affidavit, therefore, as a sworn, personally incriminating statement against Dunbar provides no significant indicia of Dunbar's reliability as to the charges he makes against Jackson.

818 F.2d at 349.

The Ninth Circuit Court of Appeals ignored this well-reasoned line of authority. Instead the Court cited only the plurality opinion in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971) and *United States v. Estrada*, 733 F.2d 683 (9th Cir.), *cert. denied*, 469 U.S. 861, 105 S.Ct. 194 (1984), in support of its holding. 844 F.2d 706-707. Neither of those cases addressed the issue of an in-custody informant who, having been apprehended in the commission of a crime, seeks to implicate others in that crime. Indeed, the Court of Appeals recognized this. *Id.* Strangely, the Court of Appeals nevertheless relied upon those authorities, as well as the unsupported assertion of

"corroboration"[3], without reference to the record, in concluding that a redacted affidavit would support the probable cause determination.

If the Court of Appeals decision is allowed to remain intact, law enforcement officials will no longer seek independent corroboration of in-custody informant information before applying for a search warrant.[4] The Court

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[3] The Court of Appeals indicated that the informant had been corroborated. 844 F.2d at 727. In fact, the only corroboration was of the street petitioner resided on and a description of his vehicle. However, corroboration of such pedestrian, easily obtained facts, is irrelevant to probable cause. While under some circumstances corroboration of innocent activity may lead to a finding of probable cause, the corroborated innocent activity must provide reasonable suspicion of illegal conduct. In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983), the fact that the informant provided a range of details relating "not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted", coupled with independent police corroboration of activity "suggestive of a prearranged drug run," were necessary to the conclusion that probable cause existed. 462 U.S. at 243-245, 103 S.Ct. at 2335-36. The corroboration of the in-custody informant's information here clearly did not meet the *Gates* standard.

[4] The Court of Appeals opinion in this case also failed to properly address the staleness of the information contained in the affidavit with respect to the probable cause showing. All of the information contained in the affidavit was six months old. It was derived at or near the time when local officers raided and destroyed a marijuana cultivation site many miles away from petitioner's residence. The Court of Appeals held that the information was not stale because the lapse of time alone was not controlling and because of the "long-term" nature of marijuana cultivation. 844 F.2d at 707. However, there was absolutely no support in the record for the presumption that the marijuana cultivation site at which the informant was apprehended was a long-term, on-going operation. The marijuana

(Continued on following page)

of Appeals decision in this respect is unprecedented, misinterprets this Court's prior decisions, is inconsistent with the decisions of other Circuit Courts and should therefore be disapproved by this Court. Accordingly, we urge the Court to grant this petition.

CONCLUSION

The search in question violated the Fourth Amendment of the United States Constitution. The neutral and detached magistrate was deprived of the opportunity to assess the true and accurate facts in making her probable cause determination because the affiant knowingly presented her with false information regarding facts critical to her determination. *See, Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674 (1978). The Court of Appeals avoided addressing this disturbing conduct by applying an improper standard of review in affirming the district court's startling and unsupported finding as "not clearly erroneous".

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patch had been discovered by police, destroyed and the informant arrested approximately six months prior to the search of petitioner's home. It is reasonable to believe that anyone involved in that cultivation site would have removed any incriminating evidence once aware that the operation had been exposed. *See* 2 LaFave, *Search and Seizure,* § 3.7(a) at p.85 (1987). None of the items sought by the warrant had been seen at petitioner's residence even by the in-custody informant who claimed to have lived at that location. Under these circumstances the Court of Appeals decision in this case improperly emasculates the staleness doctrine as defined by this Court. *See, Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138 (1932).

For the reasons set forth above, petitioner respectfully requests that the Court grant this petition for writ of certiorari to address the issue of the proper standard of appellate review and to resolve the now created conflict in decisions regarding the inherent unreliability of the statements of in-custody informants under these circumstances for probable cause purposes.

DATED: September 6, 1988

Respectfully submitted,

BLACKMON & DROZD
CLYDE M. BLACKMON
DALE A. DROZD
660 J Street, Suite 260
Sacramento, CA 95814
Telephone: (916) 441-0824

Counsel for Petitioner

App. 1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LANCE DOZIER,

Defendant-Appellant.

No. 86-1249.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 12, 1987.

Decided April 19, 1988.

As Amended July 6, 1988.

Defendant was convicted upon conditional guilty plea by the United States District Court for the Eastern District of California, Edward J. Garcia, J., of one count of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) district court could refuse to allow examination in *Franks* hearing of investigating officer whose information was basis of DEA agent's affidavit; (2) district court findings, that omissions and misstatements on affidavits were not material and did not reflect knowing or reckless disregard of truth were not clearly erroneous; (3) probable cause existed on basis of redacted affidavit; and (4) warrant authorizing seizure of documents was overly broad.

Affirmed in part and reversed in part and remanded.

Opinion superseded, 826 F.2d 866.

Dale A. Drozd, Sacramento, Cal., for defendant-appellant.

Richard J. Bender, Sacramento, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before MERRILL, and TANG, Circuit Judges, and STEPHENS,* District Judge.

TANG, Circuit Judge:

Lance Dozier appeals his conviction upon his conditional guilty plea to one count of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He contends the *Franks v. Delaware* hearing afforded by the district court was inadequate because he was not permitted to call as a witness the county sheriff who supplied information to the DEA agent. He also contends that his suppression motion was improperly denied because: (1) the false statements and material omissions in the affidavit supporting the warrant were the result of intentional or reckless conduct; (2) the redacted affidavit did not support a finding of probable cause because the informant's statements were unreliable; (3) the affidavit did not support a finding of probable cause because the facts were five months old; and (4) the warrant was so facially defective in its overbreadth that the agents could not have relied on it in good faith. We affirm in part, reverse in part, and remand for further proceedings.

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

BACKGROUND

Dozier was arrested at his residence on November 21, 1985. A search by federal drug enforcement agents pursuant to a warrant issued November 20, 1985 produced the evidence which led to Dozier's conviction. The warrant was based on the affidavit of DEA agent Daniel Offield, executed on November 20, 1985 and based largely on information obtained from Sergeant Barr of the San Joaquin County Sheriff's Office. Sergeant Barr had gathered the information between May 13 and June 5, 1985, during an investigation initiated because of an anonymous tip about a marijuana siting.

According to Offield's affidavit, Barr told Offield that Barr first saw 60 marijuana plants at the site on May 13 and that on June 5 he and another officer arrested Giacchero and Meija in a clearing next to the marijuana growing equipment. The officers seized 306 marijuana plants at the time of the arrests. Meija told Barr that Lance Dozier and Paul Fuhrman were "responsible" for the marijuana garden and that he had been hired by Dozier, lived at the Dozier residence, and had been paid in cash for cultivating the marijuana plants. According to Offield's affidavit, Meija also told Barr that Dozier brought marijuana plants to the site in Dozier's yellow Dodge pickup and that the irrigation equipment at the site belonged to Dozier. Barr went to Dozier's residence the day he arrested Meija, but Dozier refused to answer questions. Barr saw two automobiles at Dozier's residence which were registered to Giacchero and Meija.

Agent Offield made additional inquiries and added the following information to his affidavit: that Dozier

owned a late model Dodge pickup and had a record detailing convictions for drug violations; that Fuhrman and two unidentified men were stopped near the marijuana site in the summer of 1984 for trespassing and that after they were released a burlap sack containing a saw, hoe, shears and black plastic pipe was found nearby; that marijuana growers tend to keep records for their operations and equipment for cultivating marijuana at their residences.

On November 20, 1985 Offield gave a draft of a search warrant and his affidavit to a U.S. Attorney, who approved them for submission to a magistrate. The magistrate directed Offield to add a sentence detailing his recent observations of Dozier at his residence then approved the warrant authorizing a search of Dozier's residence for:

> written records, financial statements, address books, United States Currency, telephone books and bills; controlled substances, including marijuana and residue of marijuana; equipment used in the cultivation of marijuana, including saws, hoes, shears, and black, plastic pipe; and records, documents, papers, and indicia of residency/ownership of premises.

Dozier requested an evidentiary hearing to establish the insufficiency of the warrant under *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The district court held a hearing at which Agent Offield testified about the numerous errors and omissions in his affidavit. The court refused to allow Dozier to call Sergeant Barr as a witness and denied Dozier's motion to suppress the evidence. Dozier timely appeals.

ANALYSIS

I. *Franks* Hearing

Whether a defendant is entitled to a *Franks* hearing is a mixed question of law and fact subject to de novo review. *United States v. Dicesare,* 765 F.2d 890, 895 (9th Cir.), *amended,* 777 F.2d 543 (9th Cir.1985); *United States v. Ritter,* 752 F.2d 435 (9th Cir.1985).

The scope of the evidentiary hearing provided is reviewed de novo as well because the decision to limit the hearing to investigation of certain portions of the affidavit or to the testimony of particular officers involves a determination of which challenged portions of an affidavit are material to the determination of probable cause. *See Ritter,* 752 F.2d at 439.

Dozier argues that the limitation of the hearing to Offield had the effect of insulating Offield from the knowledge of the investigating officer, Sergeant Barr. Dozier contends this was erroneous because in *Franks* the Court said that an attack on a search warrant includes evidence that an affiant was ignorant of true facts and insulated therefrom by other officers. 438 U.S. at 163, 98 S.Ct. at 2680.

A *Franks* hearing is held to investigate the veracity of the affiant. *United States v. Kiser,* 716 F.2d 1268, 1271 (9th Cir.1983). Offield's testimony established that he made several untruthful statements and omitted certain relevant facts. The Government stipulated to the only two facts Dozier planned to establish through questioning of Sergeant Barr, namely that Sergeant Barr (1) did not tell Offield that a car registered to Meija was at Dozier's

residence and (2) had several times unsuccessfully sought search warrants from the state district attorney.

Agent Offield admitted to false statements and omissions. The hearing to test the sufficiency of the warrant would not have brought any other relevant facts to light if Sergeant Barr had also been questioned. The district court believed there were material omissions and false statements but did not think Offield made them intentionally or with a reckless disregard of the truth. Questioning Barr would not have added any evidence to aid in analysis of Offield's mental state. Thus, the district court did not err in refusing to allow examination of Barr.

II. False Statements and Omissions

Whether false statements or omissions are intentional or reckless is a factual finding reviewed under the clearly erroneous standard. *United States v. McQuisten,* 795 F.2d 858, 863 (9th Cir. 1986); *Ritter,* 752 F.2d at 439. Whether misstatements and omissions are material to a finding of probable cause is subject to de novo review. *McQuisten,* 795 F.2d at 863.

A district court must suppress evidence seized under a warrant when an affiant has knowingly or recklessly included false information in the affidavit. *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Ninth Circuit has likewise held that a defendant may challenge a facially valid warrant when it contains deliberate or reckless omissions of facts that tend to mislead. *United States v. Stanert,* 762 F.2d 775, 781 (9th Cir.), *amended,* 769 F.2d 1410 (9th Cir.1985).

The defendant must prove by a preponderance of the evidence that there was a knowing and intentional falsehood or a reckless disregard for the truth, and that the challenged statement was essential to the finding of probable cause. *Franks,* 438 U.S. at 171-72, 98 S.Ct. at 2684.

The determination of whether misstatements or omissions are knowing or reckless or merely negligent is a factual inquiry but it is guided by cases in which this court has found reckless disregard by an affiant. *See, e.g., United States v. Davis,* 714 F.2d 896 (9th Cir.1983); (affiant signed statement written in the first person knowing that it would mislead the magistrate into believing the affiant had first-hand knowledge of the facts therein); *Stanert,* 762 F.2d 775 (reckless false statement that suspect had been arrested without mentioning there had been no conviction and reckless omission in stating the affiant investigated a lab blowup at the suspect's residence a year before without mentioning the suspect had purchased and moved into the residence after the explosion); *United States v. Chesher,* 678 F.2d 1353 (9th Cir.1982) (reckless disregard in saying a suspect was a current member of the Hell's Angels when affiant had been conducting an investigation for some time which should have apprised him that was untrue).

The district court decided that Offield was negligent in preparing the affidavit but that there was no evidence that his conduct was intentional or reckless. The court added:

> In spite of that, there are two areas that give me cause even with this explanation, that is, the fact the rap sheet information—the fact that he misread it and

> maybe even the fact that he didn't bring to the Magistrate's attention the fact that the one conviction shown there was about fifteen years old. The other piece of information in the warrant that gives me cause is the registration, putting in the affidavit that he had information that a car registered to Meija was seen at the Doziers' property.
>
> Those things are hard to reconcile. But I'll stand by my findings that there is insufficient findings to find that he lied intentionally or with a reckless disregard for the truth when he included that information in the search warrant.

The first significant false statement is that Offield stated Dozier had a record detailing convictions for drug violations. In fact Dozier had only one conviction for the use of a forged prescription. The affidavit also omitted the information that the conviction occurred 15 years earlier, when Dozier was 19, and had been set aside and dismissed pursuant to California law. The district court was concerned that the false use of the plural may have contributed to the magistrate's finding of probable cause. Because Offield explained that he simply did not know how to read the California rap sheets the district court determined the misstatement was a product of negligence. The district court did not regard the omission of the time and exact nature of the earlier conviction as material because it was a drug offense and therefore probative of likely involvement in the marijuana growing crime under investigation. This finding is not clearly erroneous.

The other significant misstatement is Offield's assertion that Barr had told him he had seen two vehicles on Dozier's property which were registered to Mejia and Giacchero (the suspects arrested near the marijuana gar-

den in June). Barr did not tell Offield the cars were registered to Mejia or Giacchero, and Offield had done a Department of Motor Vehicles check and knew that no cars on Dozier's property at the time of Mejia's arrest were registered to Mejia. It is, as the district court said, hard to reconcile Offield's actual knowledge with his false statement, but the court's determination that his conduct reflects neither knowing nor reckless disregard of the truth is not clearly erroneous.

III. Probable Cause

A magistrate's determination of probable cause is not reversed unless it is clearly erroneous. *McQuisten,* 795 F.2d at 861. A district court's probable cause determination in a case with a redacted affidavit is reviewed de novo. *United States v. Grandstaff,* 813 F.2d 1353, 1355 (9th Cir.1987).

This court must apply the "totality of the circumstances" test developed in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), to determine whether the district court had a substantial basis for concluding that probable cause existed. *Dicesare,* 765 F.2d at 896; *Stanert,* 762 F.2d at 779.

The redacted affidavit presents two basic probable cause issues, (1) the reliability of Mejia's statements and (2) the alleged staleness of the information.

As the district court pointed out, 99 and 44/100% of the information to rely on in the affidavit was Mejia identifying the "ringleader in an ongoing criminal controversy that no one had any doubt was ongoing and existing at the

time." Mejia connected Dozier with the marijuana operation by saying Dozier had hired him, he had stayed at Dozier's house and Dozier had paid him in cash. He also stated at the time of his arrest that Dozier brought plants to the site in a yellow Dodge pickup and that the irrigation equipment at the site belonged to Dozier. Dozier contends that Mejia is an inherently unreliable informant because he was caught at the scene of a crime, was an illegal alien, and might have said anything to ingratiate himself with the arresting officers. The district court found, and the Government argues, that the reliability test of *Gates* is met because these were statements against penal interest.

Dozier relies on cases concerning the admissibility of coconspirator confessions which hold that the confession of a coconspirator is presumptively unreliable and inadmissible hearsay without sufficient independent indicia of reliability to satisfy the requirements of the confrontation clause. *See Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2061-63, 90 L.Ed.2d 514 (1986); *United States v. Andersson*, 813 F.2d 1450, 1457 (9th Cir.1987); *United States v. Bernard S.*, 795 F.2d 749, 754 (9th Cir.1986). These cases are unhelpful for two reasons. First, the Supreme Court recently decided that admissibility of coconspirator statements is not subject to a test of independent indicia of reliability. *Bourjaily v. United States*, — U.S. —, —, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987). Second, we are not here concerned with the admissibility at trial of hearsay statements by a coconspirator, Fed.R.Evid. 801(d)(2)(E), or against penal interest, Fed.R.Evid. 804(b)(3), but with whether a magistrate in a warrant proceeding may credit statements of a declarant containing ad-

missions of criminal conduct. *See United States v. Harris,* 403 U.S. 573, 584, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723 (1971).

Thus we evaluate the statements made by Mejia under the totality of the circumstances test. We agree with the district court that there was sufficient indication of reliability because the information Mejia supplied had been corroborated by independent investigation. *See Gates,* 462 U.S. at 241-246 & n. 13, 103 S.Ct. at 3333-36 & n. 13. Further, the statements were against Mejia's penal interest and thus were sufficiently credible to support a finding of probable cause to search. *United States v. Harris,* 403 U.S. 573, 583-84, 91 S.Ct. 2075, 2081-82, 29 L.Ed.2d 723 (1971); *United States v. Estrada,* 733 F.2d 683, 686 (9th Cir.), *cert. denied,* 469 U.S. 861, 105 S.Ct. 194, 83 L.Ed.2d 127 (1984). We recognize that "admissions of crime do not always lend credibility to contemporaneous . . . accusations of another." *Harris,* 403 U.S. at 584, 91 S.Ct. 2082. Mejia's confession implicating Dozier occurred after his arrest, unlike the statements in *Harris* and *Estrada,* which were made at a point when the declarants were not themselves suspected of crime. *Harris,* 403 U.S. at 575, 91 S.Ct. at 2078 (tip from informant); *Estrada,* 783 F.2d at 684 (same). Nevertheless, even after arrest "[p]eople do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." *Harris,* 403 U.S. at 583, 91 S.Ct. at 2082. Even when an informant is promised payment or a "break" there remains "the residual risk and opprobrium of having admitted criminal conduct." *Id.* at 583-84, 91 S.Ct. at 2082.

Despite the skepticism with which such statements are justifiably viewed, *see, e.g., United States v. Monaco*, 735 F.2d 1173, 1177 (9th Cir.1984), they add to the reliability of the information in this case when considered under the totality of the circumstances. Mejia's information about Dozier's participation is the same information that incriminates Mejia. Mejia said Dozier hired him, housed him and paid him to tend the garden. These facts incriminated Mejia at the same time that they spread the blame to Dozier. *See United States v. Jackson*, 818 F.2d 345, 349 (5th Cir.1987) (self incrimination does not add to reliability when information implicating another is not the part of the confession that incriminates the declarant).

Our concern is with probable cause and we think the independent corroboration of the information, combined with the credibility of the declarant, constitutes a substantial basis for concluding there was probable cause to issue a warrant.

The second attack on the affidavit is that the information was stale because the affidavit was prepared on November 20, 1985 and relied primarily on information gathered during an investigation which ended in June 1985. Dozier contends the information was stale because it was five and a half months old, because the items sought had never been observed at the residence searched, and because of the easy mobility of the items sought as well as the strong incentive, assuming the information about the marijuana cultivation scheme was accurate, to move those items after the raid on the garden and the arrest of Mejia and Giacchero.

The mere lapse of substantial amounts of time is not controlling in a question of staleness. *See United States v. Foster,* 711 F.2d 871, 878 (9th Cir.1983), *cert. denied,* 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 132 (1984). Another important factor is the ongoing nature of a crime which might lead to the maintenance of tools of the trade. *United States v. Huberts,* 687 F.2d 630, 637-38 (9th Cir. 1980), *cert. denied,* 451 U.S. 975, 101 S.Ct. 2058, 68 L.Ed.2d 356 (1981). In this case, marijuana cultivation is a long-term crime and the affidavit includes an experienced DEA agent's opinion that cultivators often keep the equipment at their residences between growing seasons. The documentary records sought are the type of records typically found to be maintained over long periods of time. *See Andresen v. Maryland,* 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 2747 n. 9, 49 L.Ed.2d 627 (1976); *United States v. Reid,* 634 F.2d 469, 472-73 (9th Cir.1980), *cert. denied,* 454 U.S. 829, 102 S.Ct. 123, 70 L.Ed.2d 105 (1981).

IV. Good Faith

Whether the good faith exception of *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) applies is reviewed de novo. *United States v. Michaelian,* 803 F.2d 1042, 10046 (9th Cir.1986).

The Government agreed below that the warrant was overbroad in its authorization to seize all "written records, financial statements, address books . . . telephone books and bills." The district court decided to deny the motion to suppress because it thought the officers relied on the warrant in good faith.

The district court erred because the executing officers in this case could not have reasonably relied on this overly broad section of the warrant. *United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir.1986); *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir.1986); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir.1985). The Government relies on *Michaelian*, 803 F.2d at 1046, which applied the good faith exception to a facially overbroad warrant that had come under scrutiny at four levels of attorney review and that limited documents to be seized to specified categories and time periods. In contrast, this warrant was reviewed by only one United States Attorney and it set no parameters for the search, amounting in fact to a general warrant to seize all papers. The documentary evidence seized should have been suppressed.

The judgment of the district court is AFFIRMED in part and REVERSED in part, and the cause is REMANDED for further proceedings.

Supreme Court, U.S.
FILED
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(2)

No. 88-438

In the Supreme Court of the United States

OCTOBER TERM, 1988

LANCE R. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in its review of a district court order admitting evidence that petitioner had moved to suppress.

1. On December 6, 1985, a grand jury sitting in the United States District Court for the Eastern District of California returned a three-count indictment against petitioner and his wife. The indictment charged the two defendants with conspiracy to manufacture and distribute marijuana, possession of marijuana with intent to distribute it, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. On July 22, 1986, petitioner entered a conditional plea of guilty to possessing marijuana with intent to distribute it (Pet. 5-6).

Before entering the guilty plea, petitioner moved to suppress the evidence that had been seized from his residence.

The evidence had been seized under the authority of a search warrant that had been obtained based on an affidavit of Drug Enforcement Agent Daniel Offield (Pet. App. 3). In his motion to suppress, petitioner alleged that there was no probable cause to issue the warrant, that law enforcement officials had acted in reckless disregard for the truth in preparing the affidavit, and that the warrant was facially overbroad. The district court held a hearing on the motion pursuant to *Franks* v. *Delaware,* 438 U.S. 154 (1978), to determine the veracity of the statements in the affidavit. After the hearing, the court ruled that although there were misstatements in Offield's affidavit, they were neither intentional nor made with reckless disregard for the truth. The court further ruled that there was ample evidence in the affidavit to sustain the warrant after the redaction of the false statements in question. Finally, insofar as the warrant contained an overbroad description of the items to be seized, the district court held that the evidence was admissible under the "good faith" exception to the exclusionary rule. See *United States* v. *Leon,* 468 U.S. 897 (1984).

On appeal, the court of appeals upheld the district court's finding that Agent Offield's statements in the affidavit reflected neither knowing nor reckless disregard for the truth. In addition, the court concluded that the redacted affidavit established probable cause, and that the district court had properly limited the *Franks* v. *Delaware, supra,* hearing to the testimony of Offield. With respect to the evidence seized under the overbroad portions of the warrant, however, the court of appeals concluded that that evidence should have been suppressed because the executing officers could not have reasonably relied on the validity of those portions of the warrant. Accordingly, the court of appeals affirmed in part, reversed in part, and remanded the case to the district court for further proceedings (Pet. App. 1-14).

2. Petitioner contends (Pet. 8-13) that the issue whether false statements or omissions in an affidavit for a search warrant are intentional or reckless is subject to de novo review by the court of appeals, and that affirmance of the district court's finding on that issue was in error under any standard of review. Petitioner also contends (Pet. 13-17) that the redacted affidavit for the search warrant did not support a finding of probable cause. Whatever the merits of petitioner's contentions, however, they are not presently ripe for review by this Court. *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 238 (1967). In ruling that the documentary evidence should have been suppressed, the court of appeals set aside petitioner's conviction and remanded the case for further proceedings. Petitioner will be able to withdraw his plea of guilty, and if he is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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